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September 19, 2019

Via E-mail

Nicholas A. Fraser
Office of Information and Regulatory Affairs
Office of Management and Budget
Nicholas_A._Fraser@omb.eop.gov

Nicole Ongele
Office of Managing Director
Federal Communications Commission
Nicole.Ongele@fcc.gov
PRA@fcc.gov

Re: Opposition of AT&T to Aspects of Information Collection Proposed in 84 Fed. Reg. 43130 (Aug. 20, 2019); OMB Control No: 3060-XXXX

Dear Mr. Fraser and Ms. Ongele,

I. INTRODUCTION AND BACKGROUND

For almost four years, AT&T Services Inc.'s incumbent local exchange carrier affiliates (collectively, "AT&T") have received funding from the Federal Communications Commission's ("Commission's") Connect America Fund ("CAF") to deploy broadband service meeting Commission specifications in rural, high-cost areas identified by the Commission. AT&T receives CAF support across 18 states through the Commission's so-called CAF Phase II or "CAF II" program. As of today, AT&T has reported over 660,000 locations in CAF II-eligible areas where it is offering broadband at speeds of at least 10 Mbps download/1 Mbps upload ("10/1"). By the end of 2020, AT&T will be offering broadband at speeds of at least 10/1 to approximately 1.1 million locations. The CAF II service term is through 2020, with CAF II recipients having the option to elect a seventh year of CAF II support through the end of 2021.

CAF recipients, including CAF II recipients like AT&T, are also required to offer broadband service with latency suitable for real-time applications like VoIP. In its 2011 order establishing CAF, the Commission determined that CAF recipients must test their networks for compliance with the Commission's speed and latency requirements and report the results of this testing to the Commission's universal service fund administrator, the Universal Service Administrative Company ("USAC").[1] The Commission established the testing framework in its 2011 order but delegated to its Bureaus the task of implementing that framework. Seven years later – and a mere two years before the CAF II service term could end for some recipients – the Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the Office of Engineering and Technology (collectively, "the Bureaus") issued an order adopting the testing methodology CAF recipients are to follow for speed and latency testing.[2] Many parties filed petitions for reconsideration and applications for review, challenging multiple decisions contained in the *Order*. Almost a year later, those petitions and applications for review remain pending at the Commission.

AT&T, other CAF recipients, and several trade associations have been working closely with the Bureaus over the past year to explain providers' concerns with the *Order* as adopted last July and to craft compromise proposals that address the providers' and the Bureaus' concerns. Notwithstanding the numerous and significant challenges to the *Order* and the parties' productive discussions, on August 20, 2019, the Commission filed for Office of Management and Budget ("OMB") approval for the new information collections contained in the *Order*. The Bureaus' August 20, 2019 Supporting Statement is based entirely on decisions made in the *Order*, including decisions the providers are optimistic the Commission will change when it acts on the various petitions and applications for review. The Supporting Statement, informing OMB that the performance testing data "shall include data for the third and fourth quarters of 2019," also is inconsistent with the Bureaus' public notice delaying the commencement of performance measurement testing until the first quarter of 2020.[3]

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[1] *Connect America Fund et al.*, 26 FCC Rcd 17663, ¶ 109 (2011) ("*USF/ICC Transformation Order*").

[2] *Connect America Fund*, WC Docket No. 10-90, Order, 33 FCC Rcd 6509 (WCB/WTB/OET 2018) ("*Order*").

[3] *Compare* Supporting Statement at 3 *with Delay in Initiation of Performance Measures Testing Requirements Until First Quarter of 2020*, Public Notice, DA 19-490 (rel. May 30, 2019) (citing the

In its August 20, 2019, Federal Register notice, the Commission seeks comment on whether its proposed information collection complies with its Paperwork Reduction Act ("PRA") obligations.[4] To obtain OMB approval for a new information collection, the PRA requires the Commission to evaluate: the need for the information collection; the specific, objectively supported estimate of burden; and the plan for the efficient and effective management and use of the information to be collected.[5] Additionally, as the Commission notes in its Federal Register notice, the PRA also requires it to consult with members of the public on each proposed information collection and solicit comment to determine:

> Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; [and] ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. . . .[6]

As proposed, some of the information the Commission seeks to collect does not satisfy its statutory PRA obligations and should not be approved by OMB. Specifically, there are several proposals described in the August 20, 2019 Supporting Statement that are at odds with the Commission's obligation to certify that its proposed information collection "is necessary for the proper performance of the functions of the agency, including that the information has practical utility; . . . [and] reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency. . . ."[7] For these reasons, AT&T respectfully requests that OMB not approve several aspects of the information collection as proposed.

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pending petitions and applications for review, the lack of OMB approval for the new information collection, and the Commission's need to develop certain interfaces as the sources for the delay).

[4] 84 Fed. Reg. 43130 (Aug. 20, 2019).

[5] 44 U.S.C. § 3506(c)(1).

[6] 84 Fed. Reg. 43130. *See also* 44 U.S.C. § 3506(c)(2)(A).

[7] 44 U.S.C. § 3506(c)(3). The OMB defines "practical utility" as:

> the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process

II. DISCUSSION

Simply stated, the purpose of requiring federal high-cost recipients to report certain information to the Commission is to facilitate the Commission's review into whether these providers are complying with their service obligations and are thus spending their support consistent with section 254(e) of the Communications Act of 1934, as amended.[8] In its *USF/ICC Transformation Order*, the Commission required certain high-cost recipients to "test their broadband networks for compliance with speed and latency metrics and certify to and report the results to USAC on an annual basis."[9] With this framework in mind, we discuss why certain aspects of the proposed information collection are not "necessary for the proper performance of the functions of the agency," have no "practical utility," and fail to reduce the burden on respondents (i.e., CAF recipients like AT&T), as required by the statute and OMB's rules.

A. There Is No Practical Utility to Once-Per-Minute Latency Testing and Such Testing Will Impose Significant Burdens and Costs on Respondents.

The Bureaus announced in the *Order* their decision to require CAF recipients to test latency *once every minute* for 42 hours per quarter per subscriber (or 2,520 tests per quarter per subscriber).[10] This decision is in sharp contrast to the Bureaus' decision to require CAF recipients to test broadband speeds *once an hour* for 42 hours per quarter per subscriber.[11] The Bureaus did not request comment on once-per-minute latency testing, there is no record basis for the Bureaus' decision nor did the Bureaus provide any justification in the *Order* for establishing two separate testing regimes – one for latency and one for broadband speeds. It is for these

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> that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion . . . In the case of recordkeeping requirements . . . "practical utility" means that actual uses can be demonstrated. 5 C.F.R. § 1320.3(l).

[8] 47 U.S.C. § 254(e) (requiring eligible telecommunications carriers "to use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.").

[9] *USF/ICC Transformation Order* at ¶ 109.

[10] *Order* at ¶ 27.

[11] *Id.* at ¶ 28.

reasons that this aspect of the *Order* is subject to at least one petition for reconsideration.[12] While OMB's PRA review does not include an evaluation of the Commission's compliance with the Administrative Procedure Act, it *should* be concerned that there is no practical utility to requiring respondents to perform burdensome and costly once-per-minute latency testing, and the Bureaus offer no plan for how they will use once-per-minute latency test results and why once-per-hour latency test results are inadequate for that purpose.

At the request of staff, on two occasions AT&T performed once-per-minute latency testing and submitted the detailed testing data to staff for their review.[13] The data show that there is *no material difference* in a carrier's latency performance when measured once per minute versus once per hour. In fact, AT&T's latency measurements were slightly lower (i.e., better from a compliance perspective) when reported on a once-per-minute basis than when reported on a once-per-hour basis. Both AT&T's once-per-minute and once-per-hour latency testing results show that AT&T satisfies the Bureaus' requirement for roundtrip latency measurements to be less than 100 ms roundtrip 95% of the time.[14] While the Bureaus did not explain why once-per-hour testing was adequate for testing broadband speeds but that latency required once-per-minute testing, AT&T's test results show that harmonizing latency testing to the once-per-hour speed testing will not have the effect of masking poor latency performance. Based on AT&T's testing, which was across several technologies also used by other CAF recipients – done, again, at staff's request – there is no actual usefulness to once-per-minute latency testing as opposed to once-an-hour testing, which is required for speed testing. AT&T attaches the summary results of its two Commission submissions for OMB's review.

AT&T had to perform this once-per-minute latency testing on a manual basis because, as we explain below, our systems are not designed to automatically test latency at one-minute

[12] *See* USTelecom, ITTA, and WISPA Petition for Reconsideration and Clarification, WC Docket No. 10-90 (filed Sept. 19, 2018) (*Joint Petition*).

[13] *See* Letter from Cathy Carpino, AT&T, to Marlene Dortch, FCC, WC Docket No. 10-90 (filed April 12, 2019); Letter from Cathy Carpino, AT&T, to Marlene Dortch, FCC, WC Docket No. 10-90 (filed May 21, 2019).

[14] *See Order* at ¶ 50.

intervals. In addition to being time consuming, such frequent testing caused AT&T's testing servers to time out at various points, which resulted in AT&T being unable to capture subscriber latency measurements for minutes at a time. We would expect other respondents to have similar challenges performing and capturing per minute test results, particularly when performed on the scale that will be required under the *Order*. AT&T's second test included 100 subscribers in its CAF II-eligible areas. Pursuant to the *Order*, AT&T will have to test 50 subscribers per state or 900 subscribers across its 18 states where it receives CAF II support. If AT&T had to comply with once-per-minute latency testing, it will be required to conduct 2,268,000 latency tests each quarter or *over 9 million tests per year*. By contrast, AT&T will have to conduct 37,800 speed tests per quarter or 151,200 speed test measurements per year. These once-per-hour figures, while certainly robust, are significantly more reasonable in size for providers to manage. Moreover, with such an ample data set, it cannot be said that once-per-hour testing will not provide the Commission with sufficient information about a provider's compliance with its speed and latency service obligations.

AT&T and other CAF recipients reasonably expected that speed and latency testing would be once per hour since that was the proposal on which the Commission sought comment.[15] Based on that reasonable assumption, and Commission recognition that it must adopt measurement requirements in a timely fashion,[16] AT&T developed an automated testing system to test and capture *both* speed and latency measurements once per hour. Given the long lead times for this type of development work – it took AT&T more than three years to develop this capability for its wireline network and two years for its fixed wireless network – if AT&T had waited until after the Commission issued final CAF performance testing requirements to begin this work, it would not have finished the process in time to actually use the resulting automated testing system before its CAF II service term ends.

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[15] *See, e.g., Wireline Competition Bureau, Wireless Telecommunications Bureau, and the Office of Engineering and Technology Seek Comment on Proposed Methodology for Connect America High-Cost Universal Service Recipients to Measure and Report Speed and Latency Performance to Fixed Locations*, Public Notice, 29 FCC Rcd 12623, ¶ 9 (WCB/WTB/OET 2014) (proposing to "adopt a methodology that would require measurements to be made *once hourly* during peak periods. . . .") (emphasis added).

[16] *See, e.g., Comment Sought on Performance Measures for Connect America High-Cost Universal Service Support Recipients*, Public Notice, 32 FCC Rcd 9321, ¶ 1 (WCB/WTB/OET 2017) (describing performance measurements as "critical" to ensuring program compliance).

To *modify* our existing automated testing systems in order to test and report latency on a per-minute basis across its 18 states, AT&T will require 12 months of development time. We estimate our one-time capital costs for these modifications will be $900,000 and our operating expenses will increase by $750,000 per year.[17] AT&T would not incur these additional expenses and it could use its testing regime immediately if CAF recipients could test latency once per hour, together with speed testing.

As demonstrated by the attached summary results of AT&T's once-per-minute latency testing, there is no practical utility to imposing such a burdensome testing regime and there certainly was no cost/benefit analysis supporting the Bureaus' once-per-minute latency decision, as required under Executive Orders 13563 and 13579.[18] Indeed, staff estimates that respondents will each spend a mere $3,600 on average to test and report latency and speed measurements. Of course, this figure is an average so some carriers can be expected to spend more to comply, particularly larger carriers like AT&T that will have to perform testing in 18 states.[19] However, requiring one carrier to spend $1,650,000 in one year to implement once-per-minute latency testing – 36% of the total cost staff estimates for 1,277 respondents – clearly shows that the Commission failed to adequately perform its burden analysis.[20]

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[17] Even with an automated system, testing at such a high load will cause AT&T to incur additional operating expenses associated with collection, processing of data, and monitoring its systems.

[18] Executive Order 13563, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order (requiring all executive agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)"). *See also* Executive Order 13579, *Regulation and Independent Regulatory Agencies* (July 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies (extending the scope of the prior Executive Order to independent regulatory agencies, like the Commission).

[19] While not entirely clear, it appears from the Supporting Statement that staff's estimates assume that each of the 1,277 carriers operates in two states. If true, then staff assumes it will cost each respondent $1,800 per state, on average, to comply. That means, for AT&T, staff estimates that it should cost us $32,400 ($1,800 x 18) to implement all the testing and reporting requirements contained in this information collection. In actuality and as we explain below, AT&T's estimated costs to comply with just two aspects of this information collection exceed $4 million in one year.

[20] We also note that the Commission's Federal Register notice lists the total annual burden for testing and reporting latency and speed measurements to be 120,518 hours but at "no cost." *See* 84 Fed. Reg. 43131 (Aug. 20, 2019).

AT&T respectfully urges OMB to reject the Commission's request for approval for the new once-per-minute latency testing information collection. As demonstrated above, this onerous testing regime lacks any practical utility and the Commission plainly failed to reduce to the extent practicable and appropriate the burden on respondents, both of which are required under PRA. The Commission also has failed to provide its plan for how it will use millions of once-per-minute latency test results as well as explain why once-per-hour latency test results could not satisfy that plan. By contrast, once-per-hour latency testing and reporting, which the Commission requires for broadband speed testing, satisfies these PRA statutory requirements.

B. The Bureaus' Decision to Require Respondents to Test Only at FCC-Designated IXPs Lacks Practical Utility and Imposes Undue Costs on Respondents.

In its Supporting Statement, the Bureaus define a "test" to mean "a single, discrete observation or measurement of speed or latency conducted from the customer premises of an active subscriber at a CAF-supported location to a remote test server *located at, or reached by[] passing through an FCC-designated Internet exchange point (IXP).*"[21] Consistent with this Supporting Statement, in the *Order*, the Bureaus found that CAF recipients "must test speed and latency from the customer premises of an active subscriber to a remote test server located at or reached by passing through an FCC-designated IXP."[22] The *Order* also identified sixteen cities that the Bureaus refer to as "FCC-designated IXPs."[23] In their *Joint Petition*, USTelecom, ITTA, and WISPA asked staff to clarify that CAF recipients may test to "the nearest Internet access point," which may or may not be located in one of the Bureaus' sixteen specified cities.[24] AT&T filed comments supporting the *Joint Petition*, explaining that the Bureaus' decision is inconsistent with the Commission's determination in its *2011 USF/ICC Transformation Order* that performance measurement testing is to occur "from the end-user interface to the nearest Internet access point," with "nearest Internet access point" meaning "the Internet gateway, the

[21] Supporting Statement at 2-3 (emphasis added).

[22] *Order* at ¶ 18.

[23] *Id.* at ¶ 20.

[24] *Joint Petition* at 20.

closest peering point between the broadband provider and the public Internet for a given consumer connection."[25]

By requiring CAF recipients to drag their test traffic to servers located in the Bureaus' selected cities, rather than the nearest Internet access point to the customer, the Bureaus' testing methodology will significantly increase the distance over which tests are performed – potentially by hundreds of miles. For example, today, AT&T routes Internet-bound traffic from a wireline broadband customer in Louisiana to an Internet access point in New Orleans. It follows this routing for its CAF and non-CAF broadband customers in that state. Absent clarification by the Commission, AT&T will instead be required to re-route test traffic for selected CAF II customers in Louisiana to Dallas or Atlanta for performance testing. This routing adds an additional 450-500 miles.

Requiring AT&T to re-route a CAF customer's test traffic hundreds of miles so that it may test that Louisiana customer's broadband performance in Dallas or Atlanta (i.e., FCC-designated IXPs) not only is inconsistent with the Commission's *2011 USF/ICC Transformation Order*, it lacks any practical utility. Specifically, re-routing these customers' test traffic in this fashion will not provide the Commission with an accurate picture of the broadband speeds and latency that such customers normally obtain. Indeed, the Bureaus acknowledge that increasing the distance to the nearest IXP adversely affects broadband performance.[26] The Bureaus' *Order* and Supporting Statement offer no rationale for why CAF recipients are required to re-route their test traffic away from the nearest IXP to one located hundreds of miles away. The Bureaus state that they want a CAF recipient's testing to "show whether that customer is able to enjoy high-quality real-time applications . . . ."[27] However, to determine with any accuracy whether customers can enjoy "real-time" applications requires broadband performance testing that

[25] AT&T Comments, WC Docket No. 10-90, at 2-6 (filed Nov. 7, 2018) (quoting *2011 USF/ICC Transformation Order* at ¶ 111).

[26] *See, e.g.*, *Order* at ¶ 21 (stating that the "distance between a carrier and its nearest IXP affects latency and may affect speed as well").

[27] *Id.* at ¶ 19.

measures the *real-world experience of those customers*. As described above, the Bureaus' proposed information collection fails to do so and thus lacks actual practical utility.

Even more concerning to AT&T, the Bureaus' decision to compel CAF recipients to measure and capture test traffic in just sixteen cities will significantly increase AT&T's costs. AT&T estimates that this proposal alone will cause it to incur an additional $2.1 million in one-time costs and $300,000 per year in ongoing costs. AT&T also will require approximately 24 months to implement this new requirement because it will have to place servers in carrier hotels where it does not currently have them. While the hardware costs themselves may not be significant, installing them and the amount of time needed to do so are. The installation-related costs include deploying trailers in the event the carrier hotel lacks space, getting power augmented to the server, and, among other things, vendor costs that generally run multiple times the price of the hardware. AT&T also will incur new rent payments associated with these new servers that we estimate will cost around $100,000/year. Additionally, this installation process is a lengthy one. It took AT&T three years to install its current servers used for broadband testing, which it intended to use to satisfy its CAF speed and latency testing and reporting obligations.

As noted above, the Bureaus' estimated total cost for speed and latency testing and the submission of these results to USAC was $4.6 million dollars per year for 1,277 respondents.[28] Combining our once-per-minute latency testing-caused costs with our FCC-designated IXP-caused costs, AT&T estimates that it will spend approximately $4,050,000 in just the first year of testing. It is important to note that AT&T's estimates do not include any costs that it will incur in the highly predictable event that USAC's systems are unable to handle sixty times the data (associated with per-minute latency testing) that is actually needed from over 1,000 respondents that will be attempting to submit their data at the same time. Plainly, the Bureaus' figures are unrealistically low – $3,600 per carrier on average – and they have not provided OMB with an objectively supported estimate of burden.[29] This is another reason why OMB should not approve the Bureaus' request for approval of this new information collection.

[28] Supporting Statement at 8.

[29] *See* 44 U.S.C. § 3506(c)(1).

III. CONCLUSION

AT&T remains hopeful that the Commission will reverse the Bureaus and permit respondents to perform once-per-hour latency testing with their required once-per-hour speed testing, as well as clarify that respondents may use an Internet exchange point that is closer to their customers than IXPs located in just sixteen cities identified by the Bureaus. If the Commission issues such an order, AT&T's primary concerns with the Bureaus' Supporting Statement will be moot. Until then, however, AT&T urges OMB not to approve a new information collection based on the Bureaus' *Order*.

Respectfully Submitted,

/s/ Cathy Carpino
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September 19, 2019

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Attachments

ATTACHMENTS

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April 12, 2019

Ex Parte Letter Submitted Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90; Request for Confidential Treatment

Dear Ms. Dortch,

On April 11, 2019, I spoke with Suzanne Yelen of the Wireline Competition Bureau. Ms. Yelen asked AT&T to submit the data for its per minute and per hour latency testing, the summary results of which USTelecom, ITTA, and WISPA included in their recent *ex parte* letter.[1] Attached please find the redacted version of the requested data along with a request for confidential treatment of AT&T customer-specific information.

Ms. Yelen asked about the number of packets used in each test. AT&T used 6 Internet Control Message Protocol (ICMP) packets per ping test. In our conversation, I explained that AT&T performed these tests on short notice and we are willing to conduct additional testing at staff's request. To be clear, AT&T does not believe that further testing will show any difference in the results between once per minute and once per hour testing.

Please do not hesitate to contact me with questions.

Sincerely,

/s/ Cathy Carpino
Cathy Carpino

Attachments

cc: Suzanne Yelen
Alec MacDonell
Cha-Chi Fan

[1] *See* Letter from ITTA, USTelecom, WISPA, to Marlene Dortch, FCC, WC Docket No. 10-90, at 2 (filed April 10, 2019).

Request for Confidential Treatment under 47 C.F.R. § 0.459

Attached to this request for confidential treatment are the per minute and per hour latency test results by customer that AT&T performed last month. Commission staff requested that AT&T provide the underlying data supporting the summary test results that ITTA, USTelecom, and WISPA included in their April 10, 2019 *ex parte* letter.

Pursuant to the Commission's *Confidential Information Order*,[1] and in accordance with the Freedom of Information Act (FOIA)[2] and the Commission's Rules related to public information and inspection of records,[3] AT&T requests confidential treatment for all of customer-specific information contained in the attached data.

Statement pursuant to 47 C.F.R. § 0.459(b)

(1) Identification of the specific information for which confidential treatment is sought.

The customer-identifying information being submitted in response Commission staff's request is confidential commercial information under Exemption 4 of the FOIA, 47 U.S.C. § 552(b)(4). Accordingly, pursuant to Commission Rule 0.459(a), AT&T requests that such information not be made routinely available for public inspection. The information covered by this request is each customer's billing account number.

(2) Identification of the Commission proceedings in which the information was submitted or a description of the circumstances giving rise to the submission.

The Commission is currently considering various petitions for reconsideration and applications for review of a Bureau-level order establishing various performance testing requirements applicable to Connect America Fund (CAF) recipients. One of the items under reconsideration is the Bureaus' decision to require CAF recipients to perform latency testing once per minute, whereas CAF recipients are required to perform broadband speed testing once per hour. USTelecom, ITTA, and WISPA have argued, among other things, that once per minute latency testing is unnecessary and the Commission should harmonize the latency testing requirement with the once per hour speed testing. AT&T performed both once per minute and once per hour latency testing on some of its customers and provided the summary results of that testing to the three trade associations for inclusion in their April 10, 2019 *ex parte* letter. AT&T's testing showed that there is no difference in the results between once per minute and once per hour latency testing.

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.

(5) Explanation of how disclosure of the information could result in substantial competitive harm.

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[1] *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998) (*Confidential Information Order*).

[2] 5 U.S.C. § 552.

[3] *E.g.*, 47 C.F.R. §§ 0.457 and 0.459.

Exemption 4 requires a federal agency to withhold from public disclosure confidential or privileged commercial and financial information of a person unless there is an overriding public interest requiring disclosure, and the Commission has a longstanding policy of protecting the confidential commercial information of its regulatees under FOIA Exemption 4.

Two lines of cases have evolved for determining whether agency records fall within Exemption 4. Under *Critical Mass*, commercial information that is voluntarily submitted to the Commission must be withheld from public disclosure if such information is not customarily disclosed to the public by the submitter.[4] For materials not subject to *Critical Mass*, *National Parks* establishes a two part test for determining if information qualifies for withholding under Exemption 4.[5] The first prong asks whether disclosing the information would impair the government's ability to obtain necessary information in the future. The second prong asks whether the competitive position of the person from whom the information was obtained would be impaired or substantially harmed. If the information meets the requirements of either prong, it is exempted from disclosure under Exemption 4. Whether under *Critical Mass* or *National Parks*, the information provided by AT&T falls within Exemption 4.

The customer-identifying information being provided to the Commission is not customarily released to the public, is maintained on a confidential basis, and is not ordinarily disclosed to third parties. Disclosure would subject AT&T to substantial competitive harm.

AT&T's customer-specific information represents confidential commercial information that should not be released under the FOIA. Competitors could use the confidential information to assist in targeting their service offerings and enhancing their competitive positions, to the detriment of the competitive position of AT&T. *See, e.g., GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994).

Commission precedent has clearly found that customer-specific information is competitively sensitive and withholdable under Exemption 4.[6] Specifically, the Commission has recognized that competitive harm can result from the disclosure of confidential business information that gives competitors insight into a company's customer identities. *See Pan*

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[4] *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

[5] *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 D.C. Cir. (1974) (*National Parks*).

[6] *See, e.g., Pacific Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-23, DA 00-2618 (2000) (supporting confidentiality for collocation data); *Local Exchange Carrier's Rates, Terms and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport; Southwestern Bell Telephone Company*, 13 FCC Rcd 13615 (1998) (keeping administrative operating expenses confidential because it would provide insight into business strategies); *AT&T/McCaw Merger Applications*, 9 FCC Rcd 2610 (1994) (keeping confidential accounting records showing account balance information); *NAACP Legal Defense Fund on Request for Inspection of Records*, 45 RR 2d 1705 (1979) (keeping confidential records that contained employee salary information); *Mercury PCS II, LLC (Request for Inspection of Records) Omnipoint Corporation (Request for Confidential Treatment of Documents*), FCC 00-241 (2000) (keeping confidential marketing plans and strategy information).

American Satellite Corporation, FOIA Control Nos. 85-219, 86-38, 86-41 (1986).[7] The protective procedures established by the Commission and other governmental agencies recognize the need to keep such information confidential to the maximum extent possible. The Commission has provided the assurances that it is "sensitive to ensuring that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage."[8]

The foregoing information plainly pertains to AT&T's commercial and financial interests. It is, therefore, sensitive competitive information.

(4) Explanation of the degree to which the information concerns a service that is subject to competition.

The information being provided to the Commission involves Internet access service provided by AT&T in competition with other carriers. Internet access service is a highly competitive industry, and AT&T's services are subject to significant competition throughout the country. The presence of such competition and the likelihood of competitive injury threatened by release of the customer-specific information provided to the Commission by AT&T should compel the Commission to withhold the information from public disclosure. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Frazee v. U.S. Forest Service*, 97 F.3d 367, 371 (9th Cir. 1996); *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979).

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure.

The information being produced is treated on a strictly confidential basis and, pursuant to AT&T internal operating standards, practices, and procedures, would not ordinarily be disclosed to third parties.

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

The information at issue is treated on a strictly confidential basis and would not ordinarily be disclosed to third parties.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure.

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[7] Further, the Commission has ruled that not only should such data be protected, but also that information must be protected through which the competitively sensitive information can be determined. *Allnet Communications Services, Inc. Freedom of Information Act Request*, FOIA Control No. 92-149, Memorandum Opinion and Order, at 3 (1993). The Commission's decision was upheld in a memorandum opinion of the U.S. Court of Appeals for the D.C. Circuit, which affirmed a U.S. District Court decision protecting the information. *Allnet Communications Services, Inc. v. FCC*, Case No. 92-5351 (memorandum opinion issued May 27, 1994, D.C. Cir.).

[8] *Confidential Information Order* at ¶ 8.

The produced material should be withheld from public disclosure as long as the data in question would provide a basis for competitors to gain insight into AT&T's operations and derive competitive benefits therefrom. AT&T cannot determine when this information would become "stale" for such a purpose. Thus, the material should be kept confidential indefinitely.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Under applicable Commission and Court rulings, the subject material must be kept free from public disclosure. Exemption 4 of the Freedom of Information Act shields information which is (1) commercial or financial in nature; (2) obtained from a person outside government; and (3) privileged or confidential. *See Washington Post Co. v. U.S. Department of Health and Human Services*, 690 F. 2d 252 (D.C. Cir. 1982). The subject material clearly satisfies the first two elements of that test. With respect to the third element of that test, information is considered to be "confidential" if disclosure is likely to (1) impair the government's ability to obtain necessary information in the future, or (2) harm substantially the competitive position of the person from which the information was obtained. *National Parks*, 498 F. 2d at 770. For the reasons stated above, disclosure of the subject material would plainly satisfy that part of the test. Indeed, the Commission has recognized that competitive harm can result from the disclosure of confidential business information that gives competitors insight into a company's customer identities, which is precisely the kind of information at issue here. *See Pan American Satellite Corporation*, FOIA Control Nos. 85-219, 86-38, 86-41, (May 2, 1986).[9]

Should you have any questions please contact me. Thank you for your attention to this matter.

Sincerely,

/s/ Cathy Carpino
Cathy Carpino

Attachments

[9] Further, the Commission has ruled that not only should such data be protected but also that information must be protected through which the competitively sensitive information can be determined. *Allnet Communications Services, Inc. Freedom of Information Act Request*, FOIA Control No. 92-149, Memorandum Opinion and Order (released August 17, 1993) at p. 3. The Commission's decision was upheld in a memorandum opinion of the U.S. Court of Appeals for the D.C. Circuit, which affirmed a U.S. District Court decision protecting the information. *Allnet Communications Services, Inc. v. FCC*, Case No. 92-5351 (memorandum opinion issued May 27, 1994, D.C. Cir.).

	Every Min Latency Tests	Every Hour Latency Tests
Number of Valid Tests	5905	102
Average Latency	56.66	56.79
Std Dev to the mean	13.63	13.05
% of tests >100ms	0.20%	0.00%

Cathy Carpino
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May 21, 2019

Ex Parte Letter Submitted Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90; Request for Confidential Treatment

Dear Ms. Dortch,

Last month, AT&T Services, Inc. (AT&T) submitted the underlying data for the per minute and per hour latency testing it performed of its broadband subscribers.[1] This testing demonstrated that there was no material difference in the results from testing latency once per minute, which is extraordinarily burdensome, versus testing once per hour. In that filing, AT&T indicated that it was willing to conduct additional testing on a larger sample size of subscribers. Staff subsequently asked AT&T to do just that and to test subscribers obtaining broadband via several technologies.

Below please find the summary results of AT&T's additional per minute and per hour latency testing. AT&T tested almost 100 subscribers in its Connect America Fund Phase II-eligible areas that obtain broadband service via wireline and fixed wireless technologies. AT&T's latest testing once again demonstrates that there is no material difference in the results and the burdensome per minute latency testing is thus unnecessary.[2]

[1] *See* Letter from Cathy Carpino, AT&T, to Marlene Dortch, FCC, WC Docket No. 10-90 (filed April 12, 2019). *See also* Letter from ITTA, USTelecom, WISPA, to Marlene Dortch, FCC, WC Docket No. 10-90, at 2 (filed April 10, 2019) (providing the summary results of AT&T's latency testing).

[2] As was the case with AT&T's prior per minute latency testing, for a short period of time – between 18:45 and 19:01 – one of AT&T's testing servers timed out. While AT&T's subscribers' performance was unaffected by this issue, AT&T was unable to capture latency measurements during this period of time. AT&T continues to investigate the root cause of this testing server issue but it has no reason to believe its subscribers' latency measurements were any different during these few minutes than during the rest of the six-hour testing period.

Wireline 6pm-midnight

	Per Min Testing	Top of the Hour Testing
Number of Valid Tests	12,943	230
Average (ms)	46.86	50.31
Median (ms)	43.00	42.00
Std Dev	69.89	74.51
% Higher than 100ms	1.17%	3.04%

Fixed Wireless 6pm-midnight

	Per Min Testing	Top of the Hour Testing
Number of Valid Tests	14,623	220
Average (ms)	55.53	57.19
Median (ms)	54.00	54.00
Std Dev	30.85	43.22
% Higher than 100ms	1.92%	2.73%

To assist the Bureau in its analysis of these results, we are submitting the detailed testing results along with a request for confidential treatment of AT&T customer-specific information.

Please do not hesitate to contact me with questions.

Sincerely,

/s/ Cathy Carpino
Cathy Carpino

Attachments

cc: Suzanne Yelen
Alec MacDonell
Cha-Chi Fan
Cathy Zima